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CASE CLIPS

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CRIMINAL LAW ISSUE

WALKER v. STATE, No. 49A02-0101-CR-30, ___ N.E.2d ___ (Ind. Ct. App. Nov. 19, 2001). FRIEDLANDER, J.

Walker first argues that the use of the handgun to enhance both his voluntary manslaughter conviction and his robbery conviction violated Indiana's Double Jeopardy Clause and, therefore, contends that his robbery conviction should be reduced to a class C felony. He correctly observes that his voluntary manslaughter conviction was enhanced from a class B felony to a class A felony because the offense was committed by means of a deadly weapon, and his robbery conviction was enhanced from a class C felony to a class B felony because the offense was committed while armed with a deadly weapon.

. . . .

We recognize our pre-*Richardson* cases that have broadly held that double jeopardy is not violated by the elevation of multiple felony charges on the basis that the defendant was armed with a deadly weapon while committing separate and distinct crimes. *See e.g. Hart v. State*, 671 N.E.2d 420 (Ind. Ct. App. 1996); *Lingler v. State*, 635 N.E.2d 1102 (Ind. Ct. App. 1994), *aff'd in relevant part*, 644 N.E.2d 131 (Ind. 1994). We have explained the reason behind the rule as follows:

> "The element causing the elevation of [the defendant's] offense was not the act of harming someone. It was the threat of harm from a deadly weapon. That threat occurred during each of the offenses for which [the defendant] was convicted and as such was properly punishable."

Barker v. State, 622 N.E.2d 1336, 1338 (Ind. Ct. App. 1993) (quoting *White v. State*, 544 N.E.2d 569, 570 (Ind. Ct. App. 1989), *trans. denied*), *trans. denied*. While this rule may still hold true in most instances, in light of *Richardson*, we must further analyze the actual evidence used in each case to support the enhanced convictions. [Footnote omitted.]

In the instant case, the evidence establishing armed robbery was clearly intertwined with the evidence establishing voluntary manslaughter as a class A felony. Walker's act of shooting Smith with a handgun was used by the State not only to establish murder, ultimately determined by the jury to be voluntary manslaughter, but was also the focus for establishing the force used to commit the robbery. [Footnote omitted.] This force occurred while armed with a deadly weapon. Although Walker may have been armed when he later removed the cell phone from Smith's person, the State did not seek to establish this. Further, the threat of harm from the deadly weapon, as addressed in *Barker* and *White*, had already materialized, and the State presented no evidence of an additional threat of harm.

In light of the actual evidence presented at trial, we conclude that there is a reasonable possibility that the evidentiary facts used by the jury to enhance Walker's conviction for

voluntary manslaughter may also have been used to enhance his conviction for robbery. We accordingly remand this case to the trial court with instructions to reduce the robbery conviction to a class C felony and to reduce his corresponding sentence to the presumptive sentence of four years.

. . . .

BAKER and ROBB, JJ., concurred.

CIVIL LAW ISSUES

EQUICOR DEV., INC. v. WEST-FIELD WASHINGTON TOWNSHIP PLAN COMM'N, No. 29S02-0105-CV-239, ___ N.E.2d ___ (Ind. Nov. 15, 2001).

BOEHM. J.

We hold that in the absence of a claimed violation of due process or equal protection rights, or their state counterparts, it is improper to inquire into the motive behind a zoning commission's denial of a subdivider's proposed primary plat. However, under the circumstances of this case, the commission is estopped from raising the deficiencies it cited to deny the proposal.

. . . .

The Court of Appeals agreed with the trial court that there was substantial evidence supporting the Commission's denial of Equicor's plat, but nevertheless reversed. Equicor Dev., Inc., v. Westfield-Washington Township Plan Comm'n, 732 N.E.2d 215 (Ind. Ct. App. 2000). The Court of Appeals found the Commission's decision was "arbitrary and capricious" because the Commission's true motive was a concern for density and because similar plats had been approved without requiring the designation of parking spaces. [Citation omitted.] . . .

. . . .

An inquiry into the motive of an agency action may be proper in some circumstances, notably where there is a claimed violation of rights protected by the Fourteenth Amendment. . . .

In some sense, if an agency's unstated reason for its action is incorrect as a matter of law, the action may be viewed as based on an improper motive. We think the "improper motive" required to permit examination of the agency's reasons is more restrictive than that. In significant part this conclusion is driven by practical considerations. If motivation is open to question in every case where the agency is claimed to have cited an incorrect factor for its decision, it raises the prospect of discovery of each member of the agency as a routine step toward judicial review of administrative action. This in turn escalates the potential cost and delay by an order of magnitude. . . . We conclude that a bona fide claim of violation of due process or equal protection rights, or their state law counterparts, is required before an inquiry into the subjective motivation of the agency may be launched.

. . . .

As a general matter, government entities are not subject to equitable estoppel. [Citation omitted.] However, this Court has held that in certain situations application of estoppel of government entities is appropriate. [Citations omitted.] Specifically, estoppel may be appropriate where the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak. [Citations omitted.]

Although the Plan Commission suggested other changes in the plat, it was silent as to any parking issue. In response to the suggestions that were made, Equicor added green space and made minor changes to the streets, but made no changes in the apparently acceptable parking. Equicor thus relied on the Plan Commission's silence by proceeding in

the reasonable belief that the plat would be approved and failing to make changes in the easily correctable flaws in the parking designation.

We are dealing here with a formal defect—failure to designate the spaces. There is no claim that the project is substantively flawed, and the Commission does not assert that the project in fact has less parking than required. As Equicor points out, the plat itself reveals driveways ("on-site") and curbside spaces ("off-site") that are apparently in compliance with the requirement of two on-site and one-half off-site spaces per unit. Raising a formal defect such as failure to designate these visible, if undesignated, spaces at the last moment permits agencies to fumble endlessly with proposals that are entirely lawful. Under these circumstances, the Plan Commission's failure to object to the undesignated spaces resulted in Equicor's detrimental reliance thereon and, therefore, estoppel is appropriate in this case. [Citation omitted.]

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

BROWN v. BRANCH, No. 07S04-0011-CV-716, ___ N.E.2d ___ (Ind. Nov. 16, 2001).

RUCKER, J.

Clifford Brown reneged on a promise to give a house to his girlfriend Rhonda Branch. She sued, and the parties debated whether Brown's oral promise was subject to the Statute of Frauds. After a bench trial, the trial court awarded the house to Branch under the theory of promissory estoppel. The Court of Appeals affirmed on that theory and also determined that Brown's promise was not within the Statute of Frauds. We grant transfer and hold that an oral promise to give another person real property falls within the Statute of Frauds. We also hold that although the doctrine of promissory estoppel may remove an oral promise from the statute's operation, in this case Branch failed in her burden of proving that the doctrine applies.

. . . .

Although not often articulating it as such, our courts have long applied the principle that an agreement to convey land is subject to the Statute of Frauds' writing requirement. And this is so whether there is actually a "sale" as the term is commonly used. See, e.g., Hensley v. Hilton, 191 Ind. 309, 131 N.E. 38, 40 (1921) (contract to "devise" real estate required to be in writing); Fuelling v. Fuesse, 43 Ind. App. 441, 87 N.E. 700, 701 (1909) (mutual agreement concerning a boundary line between parties required to be in writing); McCoy v. McCoy, 32 Ind. App. 38, 69 N.E. 193, 195 (1903) (contract for the "exchange" of real estate required to be in writing). Indeed, over three quarters of a century ago, our courts implicitly acknowledged that a gift of land was subject to the operation of the Statute of Frauds. Osterhaus v. Creviston, 62 Ind. App. 382, 111 N.E. 634, 636-37 (1916) (concerning the allegation that one party "gave" thirty acres of land to another, the court observed that "a parol gift, or a verbal contract for the sale of land, may be taken out of the operation of the statute of frauds . . . . ").

Requiring a writing for transactions concerning the conveyance of real estate, regardless of whether a sale has occurred within the dictionary definition of the term, is consistent with the underlying purposes of the Statute of Frauds, namely: to preclude fraudulent claims that would likely arise when the word of one person is pitted against the word of another, Summerlot v. Summerlot, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980), and to remove the temptation of perjury by preventing the rights of litigants from resting wholly on the precarious foundation of memory, Ohio Valley Plastics, Inc. v. National City Bank, 687 N.E.2d 260, 263 (Ind. Ct. App. 1997), trans. denied. . . . Nonetheless, even when oral promises fall within the Statute of Frauds, they may be enforced under the doctrine of promissory estoppel. [Citations omitted.] . . .

. . . .

In the case before us, the record shows that in order to accept Brown's oral promise of the 135 house, Branch quit her modest job, dropped out of college at the end of the semester, and moved back to Indiana from Missouri where she had been living with her parents. [Citation to Record omitted.] For sure Branch was inconvenienced as well as denied the benefit that Brown's promise was intended to confer. However, Branch has not shown that her reliance on Brown's oral promise resulted in the "infliction of an unjust and unconscionable injury and loss" that would remove the promise from the operation of the Statute of Frauds. We are therefore constrained to reverse the judgment of the trial court.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

CANNON v. CANNON, No. 49S05-0101-CV-38, ___ N.E.2d ___ (Ind. Nov. 16, 2001).

SULLIVAN, J.

Joyce Cannon sought "spousal maintenance" in her divorce from Gerald Cannon, contending that she was unable to support herself due to physical and mental incapacity. We agree with the divorce court and the Court of Appeals that Joyce was not entitled to maintenance payments. However, those courts should not have considered such factors as depletion of material assets in deciding entitlement to spousal maintenance.

. . . .

Here Joyce seeks incapacity maintenance. As such, Voigt [v. Voigt, 670 N.E.2d 1271 (Ind. 1996)] informs us that determining Joyce's claim to incapacity maintenance must be evaluated by giving a strict if not literal interpretation to the language of the statute. That is, the trial court could only award incapacity maintenance if it found Joyce to be physically or mentally incapacitated to the extent that her ability to support herself was materially affected. And, although the language of the statute appears to give the trial court some discretion not to award maintenance even where it makes such finding, we believe the strict construction principles applicable in this area narrowly limit that discretion as well. [Footnote omitted.]

. . . .

After it addressed the medical and garage sale evidence, the trial court made three additional findings. It held that during the pendency of the divorce action, Gerald had paid, pursuant to court order, specified amounts in "spousal maintenance," mortgage payments, and Joyce's insurance premiums. It further held that since separation Joyce had liquidated and utilized specified marital assets. Lastly, it held that during the pendency of the divorce, Joyce had spent money on home remodeling, cosmetic surgery, and a vacation. From these three additional findings, the court concluded that its order denying Joyce's request for spousal maintenance "is not erroneous under the circumstances." [Citation to Record omitted.]

. . . .

[A]s we pointed out at the outset of this discussion, the Legislature has narrowly circumscribed the authority of courts to award spousal maintenance. While such factors as payments made by one spouse to another pursuant to the terms of provisional orders and depletion of marital assets are appropriate considerations in dividing the marital pot, . . . we believe that the statutory scheme for spousal maintenance does not admit of such considerations. Where a trial court finds that a spouse is physically or mentally incapacitated to the extent that the ability of that spouse to support himself or herself is materially affected, the trial court should normally award incapacity maintenance in the absence of extenuating circumstances that directly relate to the criteria for awarding incapacity maintenance.

Because the trial court here found, irrespective of the provisional payment and depletion of asset issues, that Joyce had not demonstrated an entitlement to incapacity maintenance, no reversal or remand is required.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

JUVENILE LAW ISSUE

MATTER OF THE PATERNITY OF A. M. C., No. 49A02-0105-JV-270, ___ N.E.2d ___ (Ind. Ct. App. Nov. 13, 2001).

NAJAM, J.

Carter contends that the trial court erred when it dismissed his petition to modify A.M.C.'s support because his loss of employment constituted a substantial change in circumstances. When considering a request to modify child support, the trial court must determine whether there has been a change in circumstances so substantial and continuing as to make the existing terms unreasonable. Ind. Code § 31-16-8-1; see also Ind. Child Support Guideline 4. . . .

In ruling on Carter's emergency petition, the trial court relied on Marion Circuit and Superior Court Family Law Rule 13, which provides:

> No petition for modification of custody, support or spousal maintenance shall be considered by the court unless one full year has elapsed from the date of the court's last order relating to that issue, except upon showing by verified petition setting forth the existence of an extreme emergency.

Here, Carter sought modification of child support before one year had elapsed from the trial court's June 7, 2000, order modifying its original child support order. Under the local rule, Carter was required to demonstrate that an extreme emergency existed before the trial court could consider his petition for modification. We encountered the predecessor to this rule in Gorman v. Zeigler, 690 N.E.2d 729 (Ind. Ct. App. 1998). There we disapproved of the rule in that it purports to limit a trial court's statutory authority to modify custody based upon a substantial change in conditions that affect the child's best interests. [Citation omitted.]. In Gorman, however, the appellant challenged the trial court's finding that an extreme emergency existed warranting a modification of the custody agreement. The trial court did not use the rule to bar consideration of the petition.

Here, while the trial court found that it had jurisdiction over the subject matter and over the parties, the court concluded nonetheless that it did not have jurisdiction over the modification petition because Carter's petition had not demonstrated an extreme emergency, as required by the local rule. This mandatory rule precludes the trial court from adjudicating a class of cases over which the court clearly has statutory jurisdiction. As such, the rule carves out an exception to the court's subject matter jurisdiction over petitions to modify. . . .

. . . .

Local rules for the regulation of practice within a local court are authorized by Indiana Trial Rule 81. [Citation omitted.] Indiana Code Section 34-8-1-4 also provides that "other Indiana courts may establish rules for their own government, supplementary to and not conflicting with the rules prescribed by the supreme court or any statute." Thus, a local rule cannot restrain a court's subject matter jurisdiction or jurisdiction over the parties otherwise provided by statute. [Citation omitted.] . . .

. . . We conclude that Family Law Rule 13 is a substantive rule that is inconsistent with Indiana Code Section 31-16-8-1. . . .

Family Law Rule 13 prohibits a party, except in an extreme emergency, from exercising his right to petition for modification for at least a year after a prior order. The modification statute contains no such limitation. [Citation omitted.] The local rule impedes a Marion County party's right to be heard on the merits on the same terms as a party similarly situated elsewhere in the state. Marion County courts handle more cases than the courts of any other county, and the rule may well facilitate judicial administration in the

county by deferring petitions to modify for at least one year except those deemed "an extreme emergency." But substantive rules of law enacted by our legislature are rules of general application. Indiana citizens have the same access to our courts wherever they may live within the state.

Family Law Rule 13 violates Indiana Code Section 31-16-8-1. We hold, therefore, that the statute controls and that the local rule is unenforceable. . . .

. . . .

SHARPNACK, C. J., and RILEY, J., concurred.

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